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No. 88-1496

In The
Supreme Court of the United States
October Term, 1988

THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and USAIRLINES, INC.,

Petitioners,

v.

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW BROUGHT THE SEVENTH CIRCUIT INTO CONFORMANCE WITH THE OVERWHELMING WEIGHT OF AUTHORITY WHICH HAS FOUND NO CLEAR AND MANIFEST INTENT BY CONGRESS TO PREEMPT STATE LAW DAMAGE REMEDIES FOR INJURIES CAUSED BY AIRPORT NOISE.

Contrary to the position taken by the City of Chicago, the decision rendered below by the Seventh Circuit was hardly novel. Every branch of government—from the FAA, to the Solicitor General, Congress, the lower federal courts, the state supreme courts, and even other airport operators—has consistently recognized that airport operators are subject to liability under state law damage remedies for noise caused by their airport operations and that such state damage remedies are not preempted by federal law.[1] And every branch of government has recognized the concomitant authority of airport operators to reduce or minimize their liability by controlling the noise generated by airport operations.

Standing alone against this overwhelming authority was the 1975 opinion of the Seventh Circuit in *Luedtke v.*

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[1] Indeed, this Court has thrice denied certiorari on questions virtually identical to those raised by Chicago. *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied*, 449 U.S. 820 (1980); *City of Atlanta v. Owen*, 248 Ga. 299, 282 S.E.2d 906 (1981), *cert. denied*, 456 U.S. 972 (1982); *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862, 218 Cal. Rptr. 293, 705 P.2d 866 (1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1200 (1986).

County of Milwaukee, 521 F.2d 387 (7th Cir. 1975). Recognizing that every court other than *Luedtke* that had addressed the issue of whether Congress has preempted state law damage remedies for airport noise had found no preemption (App. 17),[2] the Seventh Circuit below asked itself whether it should continue in its "go-it-alone position" or "fess up to the error". (App. 17).

After a detailed analysis of the principles governing preemption, the Seventh Circuit overruled *Luedtke* and brought the law of the Seventh Circuit into conformity with that of other jurisdictions that have addressed the issue: Congress has not preempted state law damage remedies against airport operators for noise injuries caused by airport operations. Given the overwhelming structural and evidentiary support for this position—including the consistent and repeated refusal of this Court to overrule this position—the decision below certainly does not merit review by this Court.

A. Every Branch Of Government Has Recognized That State Law Damage Remedies Have Not Been Preempted By Congress.

With the exception of *Luedtke* (now overruled by *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988)) virtually every branch of government has explicitly recognized that state law damage remedies for airport noise have not been preempted by Congress.

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[2] The sole case cited by Chicago for the proposition that state law damage remedies are preempted is *Bryski v. City of Chicago*, 148 Ill.App.3d 556, 101 Ill. Dec. 795, 499 N.E.2d 162 (2nd Dist. 1986). But as the Court of Appeals below noted (App. 17, n.5) *Bryski* relied on *Luedtke* as binding precedent.

1. The Congress.

The starting point in any preemption analysis is an examination of Congress' own words to see if there is any clear and manifest intent to preempt state law damage remedies. If Congress has explicitly stated its intentions with regard to preemption of state law damage remedies—either to preempt such remedies or to preserve such remedies—the Judiciary's analytical task should be at an end. It is not for the Judiciary to second guess Congress by searching for inferential intent when Congress has expressly mandated that there be no preemption.

Here Congress has clearly spoken and has affirmatively and unequivocally stated that state statutory and common law remedies are not preempted.

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.
>
> Federal Aviation Act, Section 1106, 49 U.S.C. Section 1506.

In the face of such an explicit command from Congress, it would be a usurpation of Congressional power for the Judiciary to find preemption of state law damage remedies in this case.

The logic behind Section 1106 is clear. Congress did not provide victims of tortious injuries by aircraft operations any federal remedies in the Federal Aviation Act. Thus, despite the so-called pervasive nature of federal safety regulations under the Federal Aviation Act, it is beyond dispute that victims of aircraft accidents—be they in the aircraft or on the ground—have state tort law remedies available to them. Cf. *In Re Air Crash Disaster Near Chicago, Illinois*, 644 F.2d 594 (7th Cir. 1981). Similarly, vic-

tims of aircraft noise, vibration and fuel dumping or spraying have no federal statutory remedy for their injuries under the Federal Aviation Act and Congress stated explicitly that it did not want to preempt any state law damage remedies available for injuries caused by aircraft operations.[3]

2. The Courts.

Relying on Congress' express intent to preserve state law damage remedies as well as the complete absence of any affirmative evidence that Congress intended to preempt such remedies, the courts that have addressed the issue have uniformly held that there has been no preemption of state law damage remedies. These cases involved noise damage actions against the proprietor of several of the nations' largest airports. *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329, 1336 (1979), *cert. denied*, 449 U.S. 820 (1980) (Los Angeles International); *Owen v. City of Atlanta*, 157 Ga.App. 354, 277 S.E.2d 338, 340 (1981), *aff'd*, *City of Atlanta v. Owen*, 248 Ga. 299, 282 S.E.2d 906 (1981), *cert. denied*, 456 U.S. 972 (1982) (Atlanta's Hartsfield International Airport); *Krueger v. Mitchell*, 112 Wis.2d 88, 332 N.W.2d 733, 740 (1983); *Ursin v. New Orleans Aviation Board*, 506 So.2d 947, 955 (La.App., 5th Cir. 1987), *rev'd on other grounds*, 515 So.2d 1087 (La. 1988) (New Orleans International Airport); *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862,

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[3] Indeed, this Court has recognized in a related context that Congress, by Section 1106 of the Federal Aviation Act, 49 U.S.C. Section 1506, had preserved state common law tort remedies for tortious injuries by airlines. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976).

218 Cal. Rptr. 293, 705 P.2d 866, 872 (1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1200 (1986).

3. The Executive Branch.

The holding of the California Supreme Court in *Greater Westchester*—that Congress had not manifested its intent to preempt state damage remedies—appeared to be in direct conflict with the Seventh Circuit's opinion in *Luedtke*. Citing this apparent conflict, the City of Los Angeles sought certiorari in this Court seeking to reverse *Greater Westchester*. The petition was denied.

Significantly, in an *amicus* brief the Solicitor General stated that it was the position of the United States Government (including the FAA) that there is no preemption of state damage remedies for injuries to person or property caused by aircraft operations. (See Brief of the United States as *Amicus Curiae* in *Greater Westchester*).

In responding to this Court's order asking for the views of the United States as to the validity of the *Greater Westchester* decision, the United States replied:

> In our view, the decision below [*Greater Westchester*] is plainly correct.
>
> Brief of United States as *Amicus Curiae*, p. 4.
>
> In sum, the California Supreme Court correctly ascertained the present state of federal preemption in the field of aircraft noise control.
>
> *Id.* at p. 8.

Further, the United States specifically criticized the *Luedtke* decision as an incorrect interpretation of *Burbank*:

> While the Seventh Circuit cited this Court's decision in *Burbank* in support of its holding, that court did not carefully examine *Burbank* (see 411 U.S. at 635-

> 636 n.14), and did not attempt to reconcile its disposition of the nuisance claim with its holding that under *Griggs, supra,* the landowners had a valid cause of action for inverse condemnation against the airport proprietor, *Luedtke, supra,* 521 F.2d at 391. The federal noise policy that was recognized in *Burbank, supra,* 411 U.S. at 635-636 n.14, does not allow for "local control of aircraft flights" and, to that extent, the Seventh Circuit was correct. However, that court failed to recognize the broad arsenal of powers otherwise available to the proprietors, which have been purposefully reserved to them because of their special ability to deal with local problems, *and the court failed to recognize that the misuse or failure to use such powers could result in tort liability.*
>
> Brief of United States as *Amicus Curiae,* p. 6, n.3 (emphasis added).

The United States also acknowledged that airport proprietors were liable under state law for damages for personal injuries as well as for property damage:

> Nor is it relevant that, here, the City has been held liable in tort for personal injury, whereas the more frequent claim involves a taking of property by inverse condemnation. The noises of jet aircraft landing and taking off from airports which cause *personal* injuries are the same noises that simultaneously cause takings of property. *In both cases, such noise is the responsibility of airport proprietors who have built the airport, located the runways and maintain sole responsibility for the operational decisions at those facilities.* Under this Court's ruling in *Griggs v. Allegheny County, supra, the City of Los Angeles is liable for torts as well as for takings.*
>
> *Id.* at p. 9 (emphasis added).

B. Concomitant With The Airport Proprietor's Liability, The FAA, The Courts And The Congress Have Consistently Recognized The Proprietor's Ability To Control Use Of The Airport To Control Noise.

Concomitant with the recognition that there has been no preemption of airport operator's liability, virtually every branch of government has recognized that the airport proprietor (and not the FAA) has primary authority to control the level of noise at its airport. The FAA has been very explicit that there is no preemption of the proprietor's authority. FAA controls the noise emissions from given aircraft types through its emission limitations under 14 CFR Part 36, but the airport proprietor has the authority to control the amount of noise allowed at any given airport.

> Responsibility for determining the permissible noise levels for aircraft using an airport *remains with the proprietor of that airport.* The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type of certification and *are not intended* to substitute federally determined noise levels *for those more restrictive limits determined to be necessary by individual airport proprietors* in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce.
>
> *Adoption of Noise Type Certification Standards and Procedures*, 34 FR 18355, November 18, 1969 (emphasis added).
>
> * * *
>
> [T]he FAA, in response to the Griggs decision (see above), recognizes the right of State or local public agencies, *as the proprietors of airports*, to issue nondiscriminatory restrictions with respect to the per-

> missible level of noise that can be created by aircraft using their airports.
>
> *Id.* at 18356 (emphasis added).
>
> [T]he Federal Government should not substitute its judgment for that of the airport operator in determining the service desired by the airport operator or the steps that the responsible airport operator is willing to take to obtain the service, and that the Federal Government should recognize the airport proprietor's right to issue regulations or establish requirements as to the permissible levels of noise which can be created by aircraft using the airport. . . .
>
> *Id.* at 18356.
>
> [T]he actual noise generated at a given airport in operation is not a question for type certification, *but involves the right of airport proprietors to limit the permissible levels of noise that can be created by aircraft using the airport. If further noise reduction must be achieved* at a given airport, the judicial decisions and the legislative history of Public Law 90-411 have made it clear that *this is a matter for the airport proprietor.*
>
> *Id.* at 18357 (emphasis added).

Consistent with the clear understanding that airport proprietors could restrict the use of their airports, the courts have upheld—as not preempted—a wide variety of restrictions imposed by airport proprietors on the use of their airports. These have included restrictions on the types of aircraft which may use the airport, restrictions on the number of operations at the airport, curfews, trip length restrictions and fleet mix requirements.

In *Santa Monica Airport Association v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), the Ninth Circuit upheld local noise reduction ordinances which included: a night curfew; restrictions on low aircraft approaches on

weekends; a maximum single noise event level; a prohibition on all jets; and a fine for any jet landings or takeoffs. In upholding the ordinances, the Court stated that:

> We have held that the power of a municipal proprietor to regulate the use of its airport is not preempted by federal legislation.
>
> * * *
>
> The legislative history shows that Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs.
>
> * * *
>
> The reasonable inference . . . is that Congress intended to allow a municipality flexibility in fashioning its noise regulations.
>
> — 659 F.2d at 104-105.

See also Global International Airways Corp. v. Port Authority, 727 F.2d 246 (2d Cir. 1984), *on rehearing*, 731 F.2d 127 (1984) (upholding NY-NJ Port Authority restriction on volume of incoming operations by noisy aircraft); *British Airways Board v. Port Authority*, 558 F.2d 75, 84 (2d Cir. 1977); *British Airways Board v. Port Authority*, 564 F.2d 1002 (2d Cir. 1977); *Arrow Air, Inc. v. Port Authority*, 602 F.Supp. 314 (S.D.N.Y. 1985) ("Contrary to Arrow's assertion, nothing in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), casts any doubt on the authority of an airport proprietor to regulate aircraft noise," 602 F.Supp. at 318); *National Aviation v. City of Hayward*, 418 F.Supp. 417 (N.D. Cal. 1976); *Air Transportation Association of America v. Crotti*, 389 F.Supp. 58, 63 (N.D. Cal. 1975) (The three-judge court stated: "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant. . ." 389 F.

Supp. at 63-64); *Cf. San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1316-1318 (9th Cir.), *cert. denied*, 455 U.S. 1000 (1981);[4] *Western Airlines, Inc. v. Port Authority*, 658 F.Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987) (affirmed 1500-mile perimeter rule by proprietor); and *Midway Airlines, Inc. v. County of Westchester*, 584 F.Supp 436 (S.D.N.Y. 1984).[5]

II. THE DECISION BELOW IS CONSISTENT WITH THE REQUIREMENTS OF THE COMMERCE CLAUSE.

Chicago suggests that payment of damages for state tort damage claims—or restrictions on the use of the airport in order to reduce noise—would be an unconstitutional burden on interstate commerce. If this preposterous argument is accepted, it would mean that all state damage remedies for tortious injuries caused by interstate truck, bus, train, and automobile traffic would also constitute an

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[4] While striking down an attempt by the state of California to impose a curfew on San Diego's Lindbergh airport because the state was not the proprietor, the Ninth Circuit in *Gianturco* reaffirmed the right of Port District *as proprietor* of the airport to impose nighttime curfew on San Diego's airport. The Court also noted with apparent approval the award of compensation under *state tort law* theories citing *Westchester*, 651 F.2d at 1313 n. 16.

[5] Nor is their any evidence (as suggested by Chicago) that Congress, in passing the Airline Deregulation Act of 1978, intended to restrict the right of the airport proprietor to control and limit noise from aircraft operations using its airport. Indeed, Congress has explicitly reaffirmed the *proprietor's regulatory* authority in 49 U.S.C. sec. 1305(b)(1). In explaining the purpose of this section, Senator Kennedy stated that Congress did not want to interfere with the "long recognized powers of the airport operators to deal with noise and other environmental problems at the local level". *Remarks of Senator Kennedy on 49 U.S.C. Section 1305(b)(1)*, 124 Cong. Rec. 37419, October 14, 1978.

undue burden on interstate commerce. Moreover, the City conveniently failed to inform the Court that municipalities around the country have regularly imposed—for their own benefit—charges on interstate air travel, and the courts have declared that such charges are not a burden on interstate commerce. *See, e.g., Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (head tax on interstate travelers); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) (airline fuel tax). The City of Chicago did not feel it was an undue burden on interstate commerce when it imposed a tax on aviation fuel sold at O'Hare to raise millions of dollars for local revenue. *United Airlines v. City of Chicago*, 116 Ill.2d 311, 507 N.E.2d 858 (1987).

Not only are damage remedies not barred by the Commerce Clause, but proprietor-imposed noise restrictions can also be consistent with the Commerce Clause. The courts have upheld such restrictions from Commerce Clause challenges as long as they did not discriminate against interstate commerce in favor of local commerce and as long as they served a legitimate local purpose. *See, e.g., Arrow Air, Inc. v. Port Authority*, 602 F.Supp. 314, 321-322 (S.D.N.Y. 1985).

CONCLUSION

For all the foregoing reasons, Respondent Lawrence C. Bieneman respectfully requests this Court to deny Petitioner City of Chicago's Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Respectfully submitted,

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